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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63
	)	
Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	CC Docket No. 98-157

REPLY COMMENTS OF
FOCAL COMMUNICATIONS CORPORATION AND
HYPERION TELECOMMUNICATIONS, INC. d/b/a
ADELPHIA BUSINESS SOLUTIONS

Focal Communications Corporation ("Focal") and Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions ("Adelphia"), by their counsel, and pursuant to the Commission's August 27, 1999, Notice of Proposed Rulemaking ("NPRM"), hereby submit their Reply Comments in the above-captioned proceeding. Through these Reply Comments, Focal and Adelphia re-emphasize the two points they advocated in their initial Comments. First, the Commission should not abandon the existing per-minute local switching rate structure in favor of a capacity-based rate structure. Second, the Commission should not regulate CLEC switched access services in great detail, but instead should implement a system of benchmarks through which CLEC access rates will be evaluated.

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I. Local Switching

In their initial comments in this proceeding, incumbent LECs, CLECs and IXCs uniformly agree that the Commission should not abandon its existing per-minute local switching rate structure in favor of a capacity-based rate structure. The current access charge rate structure has been developed by the Commission over the last two decades, and was refined as recently as two years ago in the *Access Charge Reform Order*. Since that time, nothing has changed in the physical provisioning of local switching or in cost-causation principles that would warrant a departure from the per-minute local switching rate structure. Moreover, nowhere in the record in this proceeding is there any demonstration that movement to a capacity-based plan is cost-justified. In fact, USTA made an extensive showing to the contrary.[1] The legitimacy of the current rate structure is further buttressed by the fact that virtually every state commission that has considered this issue has determined that the economic costs of local switching are most appropriately recovered through per-minute charges. Moreover, several IXCs properly note that they will be unfairly disadvantaged if they were unable to purchase shared transport and local switching on a per-minute basis. Specifically, smaller IXCs would be forced to purchase local switching and dedicated transport capacity in amounts that exceed their actual requirements to ensure that they have adequate capacity during peak periods. *See, e.g.*, *Comments of Cable & Wireless* at 5.

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[1] *See Comments of the United States Telephone Association, Comments of W.E. Taylor*, at 6-11.

A radical shift to a different rate structure at this point would disrupt the business plans of all carriers, and would create uncertainty where none need exist. *See Comments of Bell Atlantic* at 3. Furthermore, such a change would require network reconfiguration on the part of both LECs and IXCs to accommodate the new rate structure, and result in significant unnecessary implementation costs. *See MCI WorldCom Comments* at 10-11. In short, implementation of a capacity-based local switching rate structure would create uncertainty and impose substantial implementation costs without resulting in any concomitant benefits.

II. <u>CLEC Access Charges</u>

As a threshold matter, it is important to note that MCI WorldCom, the nation's second largest long distance carrier, has asserted that there is simply no evidence in the record to support the claim that there is a widespread problem of CLECs charging IXCs unreasonably high access rates. *MCI WorldCom Comments* at 18. However, to the extent that the Commission deems that any regulation is necessary to constrain CLECs from potentially charging unreasonable access rates, Focal and Adelphia urge the Commission to adopt the least intrusive regulation possible.

Specifically, Focal and Adelphia advocate the establishment of a series of benchmarks through which CLEC access rates will be evaluated. If a CLEC's access rates are at or below the level of the incumbent LEC serving the same geographic area, taking into account both the incumbent LEC's per-minute and flat-rate charges, than the CLEC should be afforded a safe harbor against a Section 208 complaint. If a CLEC's access rates are within 25% of the incumbent LEC's adjusted rate, the rates should be presumed just and reasonable. IXCs should be able to file a Section 208 complaint against rates in this range, but should bear a heavy burden to overcome the presumption. Finally, for CLEC access rates that exceed these benchmarks, IXCs should be permitted to challenge such rates through a Section 208 complaint, without facing a presumption of reasonableness, but CLECs should be given an opportunity to demonstrate that their rates are in fact just and reasonable. Under no circumstances, however, should IXCs be allowed to continue to engage in self-help by unilaterally refusing to pay CLECs their lawfully tariffed switched access rates.

The current investigation into the reasonableness of CLEC switched access rates was instigated by AT&T through its Petition for a Declaratory Ruling seeking a determination that IXCs may refuse to purchase CLEC switched access services. AT&T still maintains that it is not required to purchase access service from CLECs (or, presumably, from ILECs if it is dissatisfied with *their* rates), notwithstanding the interconnection and nondiscrimination duties of the Act. It claims, disingenuously, that the Common Carrier Bureau has endorsed its position that "an IXC is free to refuse a CLEC's switched access service . . . ." *AT&T Comments* at 29-30 n.51, and at 32 n.55. First, this claim is hypocritical, since AT&T reportedly is refusing to comply with the Bureau decision it cites on the ground that it is not final as long as AT&T's application for review is pending. Second, it is a misstatement of the Bureau's conclusion, because the decision only addressed certain limited provisions of law (for example, it did not analyze or even cite Section

251(a)(1) of the Act) and expressly noted that "AT&T also may well be subject to other statutory or regulatory restrictions in its purchase of access services . . . but MGC has not raised them in this proceeding.[2] Focal and Adelphia agree with USTA that the Commission should use this proceeding to reject squarely any notion that IXCs can pick and choose which LECs they will interconnect with, or which end users they will complete calls to. *See USTA Comments* at 22-23.

Perhaps in recognition of the shaky foundation for its refusal to pay for tariffed access services, AT&T now sets forth a completely different position in its comments in this proceeding, but this latest proposal raises more questions than it answers. AT&T suggests that the Commission can constrain CLEC access rates by "encouraging CLECs to detariff their access services, particularly where their rates exceed the corresponding ILEC charges in the same service area." *AT&T Comments* at 30. AT&T styles this approach as a "permissive tariff mechanism" that is less intrusive than other alternatives being considered by the Commission. If AT&T were truly advocating the adoption of a permissive detariffing scheme, it would be proposing nothing, since the Commission has already permissively detariffed CLEC access services.[3] Upon closer scrutiny, however, it becomes apparent that what AT&T is advocating is not permissive detariffing for CLEC

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[2] *MGC Communications, Inc. v. AT&T Corp.*, File No. EAD-99-002, Memorandum Opinion and Order, DA 99-1395, para. 12 (Com. Car. Bur. released July 16, 1999).

[3] *See Hyperion Telecommunications, Inc. Petition Requesting Forbearance; Time Warner Communications Petition for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, 12 FCC Rcd 8596 (1997).

access services, but rather something more akin to the level of rate regulation imposed on incumbent LECs.

Under AT&T's plan, CLECs may continue to file streamlined tariffs if their rates are at or below the level of the incumbent LEC serving the same geographic area. If a CLEC's rates are higher than the corresponding incumbent LEC, than CLECs should "be required to justify them in traditional, non-streamlined tariff review proceedings with full cost support." *AT&T Comments* at 31. Obviously, requiring CLECs to justify their rates in full-blown cost proceedings, even when no complaint has been filed, is the *most intrusive* and artificial regulatory solution available to address any market failures regarding CLEC access rates. This proposal seems designed primarily to relieve AT&T of the statutory burden of proving, in a Section 208 complaint, that the rates it dislikes are actually unjust and unreasonable, and shifting all the costs and burdens of regulation to the CLECs. Perhaps what AT&T means when it says that its proposal is less intrusive is that it is less intrusive on AT&T.

The only viable approach to constraining CLEC access rates in a manner that is consistent with Congress' and the Commission's deregulatory objectives is to establish benchmark rates to assist in evaluating the reasonableness of those rates. This approach will provide certainty to both CLECs and IXCs in determining which rates are reasonable, and which are "outliers." Equally important is that once benchmark rates are established, the Commission makes clear that self-help measures on the part of IXCs will not be tolerated. If an IXC believes that a CLEC's access rates are at an unreasonable variance from the benchmark rates, IXCs should be required to file a Section 208 complaint challenging those rates. After the CLEC has an opportunity to justify its rates, the Commission must decide whether the rates are in fact reasonable.

Conclusion

For the foregoing reasons, Focal and Adelphia submit that the Commission should not abandon the existing per-minute of use rate structure in favor of a capacity-based rate structure, and urge the Commission to refrain from regulating CLEC access services in great detail. Instead, the Commission should establish benchmark rates through which CLEC access rates will be evaluated, consistent with Focal's and Adelphia's proposal discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Comments of Focal Communications Corporation and Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions have been served by hand delivery to the persons on the attached list.

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